Supreme Court, U.S.
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No. 03-361

In The
Supreme Court of the United States

DARWIN NEIBAUR and JUNE NEIBAUR HUSBAND AND WIFE, and DARWIN NEIBAUR FARMS, a Partnership,

Petitioners,

v.

EDWARD G. ELLIOTT and MARY L. ELLIOTT,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Idaho Supreme Court erred in holding that findings of fact and conclusions of law and orders of dismissal entered by a Bankruptcy Court, and subsequently affirmed on appeal by a Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals, were *res judicata* as to the issues and defenses decided by the Bankruptcy Court when those issues and defenses were subsequently raised in the Idaho District Court by the Petitioners, Darwin Neibaur and June Neibaur.[1]

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[1] In framing the Question Presented as they have, the Petitioners ignore the fact that they chose to litigate the issues and defenses decided by the Bankruptcy Court in that forum by filing petitions for Chapter 12 bankruptcy relief on the eve of the trial of those matters by the State Court; they ignore the fact that all of those issues and defenses were tried exhaustively before the Bankruptcy Court over a seven day period; they have not informed this Court that they subsequently appealed the Bankruptcy Court's decision to a Bankruptcy Appellate Panel which, after reviewing those claims *de novo*, affirmed the Bankruptcy Court's decision and entered its own Memorandum and Judgment addressing each of those defenses and issues; and they have not informed this Court that the decisions of both the Bankruptcy Court and the Bankruptcy Appellate Panel were subsequently upheld by the Ninth Circuit Court of Appeals on the Petitioners' appeal to that Court. For that reason, Respondents believe Petitioners' statement of the Question Presented by their Petition mischaracterizes the issue before the Court.

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OPINIONS AND ORDERS BELOW

In addition to the Opinion of the Idaho Supreme Court (Pet., App. 1-29) the Order Denying Petitions for Rehearing (Pet., App. 43-44) and the Opinion and Order Re Motion for Summary Judgment of the trial court (Pet., App. 30-39) offered by the Petitioners, Respondents offer the Memorandum of Decision of the Bankruptcy Court (App., *infra*, 1-16), the Memorandum Decision of the Bankruptcy Appellate Panel (App., *infra*, 17-33) and the Bankruptcy Appellate Panel's Notice of Entry of Judgment (App., *infra*, 34-35).

REASONS FOR DENYING THE WRIT

The real question presented by the Petition is whether the Idaho Supreme Court erred when it ruled that findings of fact and conclusions of law and orders of dismissal entered by a Bankruptcy Court after a lengthy trial, and subsequently affirmed by a *de novo* judgment of the Bankruptcy Appellate Panel were *res judicata* as to the defenses litigated before the Bankruptcy Court when those same defenses were raised again before the trial court. The Petitioners have, by their decision to ignore or disregard important facts and the history of the case below which were part of the record before the trial court when it ruled that some of the issues raised by the Petitioners had already been decided by the Bankruptcy Court, and decided that under the doctrine of issue preclusion the Bankruptcy Court's decision was *res judicata* on those specific issues (Pet., App. at 36), misstated the decision of the Idaho Supreme Court they now seek to appeal and Petitioners base their Petition and their arguments to this

Court on a "straw man" ruling they have created rather than upon the actual ruling of the Idaho Supreme Court.

The Petitioners have not disclosed to this Court that they have previously appealed this same issue to the Bankruptcy Appellate Panel (which, after considering all of the Petitioners' arguments regarding *res judicata*, *de novo*, entered its own Memorandum decision, App., *infra*, 17, and Judgment, App., *infra*, 34) affirming the Bankruptcy Court's findings of fact and conclusions of law, nor have they disclosed to this Court that they subsequently appealed to the Ninth Circuit Court of Appeals which, in turn, affirmed the decision of the Bankruptcy Court and the Bankruptcy Appellate Panel.[2]

The Petitioners chose to end that first round of federal appeals with the adverse decision by the Ninth Circuit but now seek to have this Court review identical issues. The Respondents respectfully submit that the doctrines of "law-of-the-case" and judicial estoppel should bar the Petitioners from appealing these issues again after having previously prosecuted them to a dead end through the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals.

Neither the Idaho Supreme Court's actual ruling, the ruling of the trial court affirmed by that court, the Bankruptcy Court's decision, the decisions of the Bankruptcy Appellate Panel or the decision of the Ninth Circuit Court

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[2] That decision of the Ninth Circuit (Docket Number 97-35855) was not made until after the trial court had entered its Opinion and Order Re Motion for Summary Judgment and the decision of the Ninth Circuit was not part of the record before the Idaho Supreme Court.

of Appeals affirming that decision, give rise to the question presented by the Petition. The decision of the Idaho Supreme Court, was made *de novo* on the basis of the history of the case and well settled Idaho case law, is narrowly limited to the facts of this case and can have none of the far reaching consequences the Petitioners so direly postulate. The Idaho Supreme Court's ruling was correct, proper and well reasoned in all respects and the Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

In the case below, the trial court entered its Opinion and Order Re Motion for Summary Judgment (Pet., App. at 30-39) after it had reviewed the Memorandum of Decision (App., *infra*, 1) which constituted the Bankruptcy Court's findings of fact and conclusions of law (App., *infra*, 16) and the Memorandum decision (App,. *infra*, 17) and Notice of Judgment (App., *infra* 34) of the Bankruptcy Appellate Panel. From its review of that record, the trial court was able to determine not just that the Neibaur bankruptcy petitions and the Elliotts' adversary claims against the Neibaurs had been dismissed by the orders of the Bankruptcy Court appended to the Petition (Pet., App. at 40-41), but that all of the Petitioners' defenses, except their arguments relating to the "one-action rule," had been fully and fairly litigated before, and decided by, the Bankruptcy Court (Pet., App., at 36-37) and that all of those defenses had been reviewed, *de novo*, by the Bankruptcy Appellate Panel before it entered its Memorandum

decision and Judgment affirming the decision of the Bankruptcy Court.

The Idaho Supreme Court, in turn, had that record, and the history of the case considered by the trial court, before it when it undertook its *de novo* review (Pet., App. at 20-21) of the evidence considered by the trial court to decide whether the trial court correctly applied the doctrine of *res judicata* (particularly including "issue preclusion") when it ruled that:

> " . . . issue preclusion applies in this instance, as the Neibaurs had a full and fair opportunity to litigate this issue before the Bankruptcy Court; the issue decided in the prior Bankruptcy proceeding was identical to the issue presently addressed by this court; the issue was decided by the Bankruptcy Court; the Bankruptcy Court issued a final judgment on the merits; and the Neibaurs were a party in the prior litigation. *See Anderson v. Pocatello*, 112 Idaho 176, 731 P.2d 171, 178-179 (1987) for a recitation of the elements of issue preclusion given by the Idaho Supreme Court. (Pet., App., at 36).

The Idaho Supreme Court's analysis of the question of whether the Memorandum Decision (findings of fact and conclusions of law) of the Bankruptcy Court, its orders, the Memorandum Decision of the Bankruptcy Appellate Panel and its Notice of Judgment, taken together, supported the trial court's conclusions that the Petitioners Neibaurs' defenses of statute and limitations, impossibility, impracticability and frustration of purpose had been fully litigated before the Bankruptcy Court.

The Idaho Supreme Court's conclusion that the doctrines of *res judicata*, collateral estoppel and issue

preclusion should bar Petitioners from litigating those defenses again in the Idaho District Court was based on a full and fair consideration of the record and facts of this case and the application of well settled Idaho law. The Idaho Supreme Court was fully cognizant of the Petitioners' argument that there was no final judgment in the Bankruptcy proceeding (Pet., App., at 20), and obviously considered that argument in concluding:

> According to the bankruptcy court's written decision, the court conducted an evidentiary hearing "that consumed several days to accommodate the testimony of the many witnesses. Hundreds of pages of documentary evidence was received." The bankruptcy court addressed the Neibaurs' contention "that the Elliotts' claim should be disallowed completely, arguing that the claim is barred by the applicable statutes of limitation" and the contention that "they are otherwise excused from paying the claim by case law doctrines of impossibility of performance, and impracticability or frustration of purpose." The bankruptcy court held that the Neibaurs were not excused from the performance of the agreements with the Elliotts under either theory. The bankruptcy court found that the Neibaurs were ineligible for the relief that they sought under Chapter 12. The Neibaurs sought to convert to a Chapter 11 proceeding, however, the bankruptcy court concluded "that conversion would be a useless gesture, not likely to result in confirmed plans." The bankruptcy court stated that the Neibaurs "appear to have made peace with most of their major creditors. However, their desire to continue the battle with the Elliotts leads this Court to conclude further reorganization efforts will by [sic] fruitless." The bankruptcy court then

> dismissed the Neibaurs' case. From the record, it appears that the proceeding before the bankruptcy court resulted in "a valid final judgment rendered on the merits by a court of competent jurisdiction" which should serve as a bar to a subsequent action between the parties upon the statute of limitation and equitable defenses claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805. Accordingly, this Court upholds the district court's determination precluding a trial on the Neibaurs' arguments and defenses by operation of the doctrines of *res judicata* and collateral estoppel, based on their bankruptcy case. (Pet., App., at 21-22).

For a further discussion of the law in Idaho regarding elements of *res judicata*, collateral estoppel, issue preclusion, claim preclusion, see also *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171, 178-179 (1987) and *Hindmarsh v. Mock*, 138 Idaho 92, 57 P.3d 803 (2002).

Neither the trial court nor the Idaho Supreme Court considered the orders of the Bankruptcy Court in the kind of isolation the Petitioners would like this Court to. When the Idaho Supreme Court conducted its own *de novo* review of the question of whether the doctrines of *res judicata*/collateral estoppel/issue preclusion/claim preclusion should bar relitigation of the Petitioners' equitable defenses, it had before it the Bankruptcy Court's Memorandum Decision and the Bankruptcy Appellate Panel's decision and Notice of Entry of Judgment. Its holding was reasoned, and in light of the record before it, proper in all respects and does not call for a review by this Court.

While the Petitioners now argue that the proceedings in Bankruptcy Court did not result in a final judgment on any of the matters decided by that Court, it is interesting

to note that when they appealed that Court's decision to the Bankruptcy Appellate Panel they invoked the jurisdiction of that Court by arguing:

> " . . . The United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals has jurisdiction in this cause of action in accordance with Rule 8001 of the Unites States Bankruptcy Court Rules, which provides that a final Judgment of the United States Bankruptcy Court can be appealed to the Bankruptcy Appellate Panel of the Ninth Circuit Court or the United States District Court for the State of Idaho. In these particular cases the Judge issued an Order of Dismissal which was a final judgment." *Record of the Idaho Supreme Court*; R. Vol. 3, p. 500.

After the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's decision in all respect on July 24, 1997 (*Record of Idaho Supreme Court*, R. Vol. 3, pp. 459-474) and entered its Notice of Entry of Judgment (*Record of The Idaho Supreme Court*, R. Vol. 3, pp. 475-476), the Petitioners Neibaurs appealed to the Ninth Circuit (Court of Appeals No. 97-35855) and again certified that the decision of the Bankruptcy Court was a final judgment, stating:

> "The United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals had jurisdiction in this cause of action in accordance with Rule 8001 of the United States Bankruptcy Court Rules, which provides that a final judgment of the United States Bankruptcy Court can be appealed to the Bankruptcy Appellate Panel or to the United States District Court for the State of Idaho. The Bankruptcy Appellate Panel also had jurisdiction pursuant to 28 U.S.C.S. §158(b)(1).

> The Honorable Jim D. Pappas, United States Bankruptcy Judge for the District of Idaho, issued an Order of Dismissal in the case of Darwin P. Neibaur and in the case of June G. Neibaur which was a final judgment, and the Bankruptcy Appellate Panel affirmed the lower court's decision. The Ninth Circuit Court of Appeals has jurisdiction pursuant to U.S.C.S. §158(d)." *Record of the Idaho Supreme Court*, Vol. 3, p. 547.

The Petitioners now argue that the decision and orders of the Bankruptcy Court they formerly claimed amounted to a final judgment did not, in fact, constitute a final judgment, because provisions of 11 U.S.C. §349 are inconsistent with that conclusion. Respondents believe Petitioners' argument is without merit; the decision and orders of the Bankruptcy Court did restore Petitioners to the position they were in before they filed for Bankruptcy; they were free to seek Chapter 11 or Chapter 7 bankruptcy protection; their property was vested in them again as it was vested immediately before they commenced their Chapter 12 bankruptcies; no transfers had taken place; no liens had come into existence during their bankruptcies and they were, in all respects but one, in the same position they had been in before the Bankruptcy Court entered its Memorandum decision and orders. Because Petitioners chose to litigate their statute of limitations and equitable defenses before that Court, they were bound by its findings of fact and conclusions of law with respect to those defenses. They could have filed new bankruptcy petitions, or converted their bankruptcies, but had they done so they could not have expected to be allowed to waste the Bankruptcy Court's time and resources relitigating those same defenses. The Idaho Supreme Court, relying in part on rulings of this Court, has articulated the reasons and

policies behind the doctrines of *res judicata* and collateral estoppel:

> Collateral estoppel serves the purposes "of protecting litigants from the burden of relitigating an identical issue with the same party or his privy[,] of promoting judicial economy by preventing needless litigation," *Parklane Hosiery, supra*, 439 U.S. at 326, 99 S.Ct. at 649; see also *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971), of preventing inconsistent decisions, and of encouraging reliance on adjudications. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). To permit relitigation of an issue that was fully and fairly litigated and lost in a prior action undermines the worthwhile purposes of the collateral estoppel rule without serving any other recognizable good purpose.
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> * * *
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> The more appropriate test for whether collateral estoppel should apply includes the following: (1) Did the party "against whom the earlier decision is asserted . . . have a 'full and fair opportunity to litigate that issue in the earlier case.'" *Allen, supra*, 449 U.S. at 95, 101 S.Ct. at 415, citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) and *Blonder-Tongue, supra*, 402 U.S. at 328-29, 91 S.Ct. at 1442-43. (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?" *Bernhard, supra*, 122 P.2d at 895, quoted in *Blonder-Tongue, supra*, 402 U.S. at 323, 91 S.Ct. at 1440. (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was

> "necessary to [the prior] judgment." *Allen*, *supra*, 449 U.S. at 94, 101 S.Ct. at 414; citing *Montana*, *supra*, 440 U.S. at 153, 99 S.Ct. at 973; *Rajspic v. Nationwide Mutual Insurance Co.*, 104 Idaho 662, 665, 662 P.2d 534, 537 (1983); *Pocatello Industrial Park v. Steel West, Inc.*, 101 Idaho 783, 786, 621 P.2d 399, 402 (1980) ("In order for the doctrine of collateral estoppel to apply, the issue in question must have actually been litigated and resolved in the prior suit." (Emphasis in original; citations omitted.)). (4) "Was there a final judgment on the merits?" *Bernhard*, *supra*, 122 P.2d at 895; quoted in *Blonder-Tongue*, *supra*, 402 U.S. at 323, 91 S.Ct. at 1440. (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Bernhard*, *supra*, 122 P.2d at 895, quoted in *Blonder-Tongue*, *supra*, 402 U.S. at 323-24, 91 S.Ct. at 1440. *Id* at 183. *Anderson v. City of Pocatello*, 112 Idaho 176, 183-184, 731 P.2d 171, 174-176, 178-179 (1987).

Applying that reasoning to the facts of this case makes it evident why the Idaho Supreme Court ruled as it did in this case and clear that justice was done when it did so. The Petitioners' argument that the workings of 11 U.S.C. §349 would be undermined or destroyed if this ruling is allowed to stand completely ignores the facts and the history of this case and is postulated on hypothetical scenarios which Respondents believe cannot reasonably follow from any reasonable construction of the ruling Petitioners seek to appeal.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE BARRED BY APPLICATION OF THE DOCTRINES OF JUDICIAL ESTOPPEL AND LAW OF THE CASE

As noted above, the Petitioners have previously taken the position that the orders of the Bankruptcy Court were a final judgment subject to appeal, first to the Bankruptcy Appellate Panel, then to the Ninth Circuit Court of Appeals. The doctrine of judicial estoppel should operate to prevent them from asserting a contrary position in this appeal. The doctrine of judicial estoppel may be invoked to protect the integrity of the legal process by preventing litigants from deliberately changing legal positions to gain some advantage as Petitioners now do in this case. *New Hampshire v. Maine*, 532 U.S. 742, 749-751, 121 S.Ct. 1808, 1814-1816, 149 L.Ed.2d 968, 976-977 (2001). *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997).

The doctrine of "law-of-the-case" should also apply here and should operate independently to prevent the Petitioners from proceeding with their appeal to this Court. As noted above too, the Petitioners have previously appealed exactly the issues raised by this Petition to a Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals. After the Bankruptcy Court's decision was affirmed by both of those appellate courts, the Petitioners elected not to appeal to this Court and resumed their defense in the Idaho state court. They now seek further appellate review of issues already decided on former federal appeals. The primary purpose of the "law-of-the-case" doctrine is judicial economy and the doctrine is intended to prevent the very thing the Petitioners now seek to do. While the doctrine of "law-of-the-case" is not inflexible, Respondents submit this is a case where it is

both reasonable and proper to apply the doctrine. The Petitioners have had the claims they raise by their Petition heard and rejected by the Idaho trial court, the Bankruptcy Court, the Bankruptcy Appellate Panel, the Ninth Circuit Court of Appeals and the Idaho Supreme Court. Considerations of judicial economy should bar the Petitioners from seeking further appellate review of the issues presented by this Petition. For a discussion of the doctrine of "law-of-the-case" see *Sanchez v. Galey*, 115 Idaho 1064, 1074-1075, 772 P.2d 702, 712-713, (1978); *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3rd 425, 212 Cal. Rptr. 466, 696 P.2d 1308 (1985).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE DARWIN P. NEIBAUR, **Debtor.**	)	**Case No. 95-00205**
IN RE JUNE G. NEIBAUR, **Debtor**	)	**Case No. 95-00209** **MEMORANDUM OF DECISION** (Filed Aug. 7, 1996)

Brent T. Robinson, LING, NIELSEN AND ROBINSON, Rupert, Idaho, for Debtors.

Charles J. Nicholas, Boise, Idaho, for Creditors Edward G. Elliott and Mary L. Elliott.

Forrest Hymas, Jerome, Idaho, Chapter 12 Trustee.

Introduction

These are related Chapter 12 cases prosecuted by former spouses jointly. Before the Court for disposition are a variety of matters including confirmation of Debtors' Joint Amended Chapter 12 plans, Debtors' objections to the claim of Creditors Edward and Mary Elliott, and, the motions to dismiss or convert the cases filed by the Elliotts.

Other than the issues concerning the Elliotts, Debtors have been able to negotiate or resolve the other objections to their proposed plan. A consolidated evidentiary hearing was conducted by the Court concerning the Elliott matters

that consumed several days to accommodate the testimony of the many witnesses. Hundreds of pages of documentary evidence was received. While the issues raised by the parties are wide-ranging and numerous, upon further review of this record, the Court has determined that neither Debtor is eligible for Chapter 12 relief, and that the cases should be dismissed. Therefore, much of what has been advanced by the parties need not be addressed by the Court.

Facts.

In 1982, Debtors, then married, together with other individuals, purchased an existing John Deere farm implement dealership, and the land on which it operated, from the Elliotts. Debtors and their associates formed a general partnership to purchase the land, with $1,100,000 of the price financed by the Elliotts under a note secured by the property. The group formed a corporation to buy the business assets, giving the Elliotts a note for $1,025,000 secured by those assets, and by the personal guarantees of the principals of the company, including Debtors. Debtors granted the Elliotts mortgages on some of their farm properties as additional security for the loans, as did some of the other principals in the venture.

The parties generally understood that the income from the operation of the business, and the company's payment of rent to the corporation, would provide the source for making the monthly installment payments to the Elliotts. The Elliotts did not, however, guarantee or represent that the dealership would be profitable. As time passed after the transaction, economic conditions in America in general, and the agricultural economy in

particular, deteriorated. Interest rates and farm operating costs escalated over what was already high levels, and farm commodity prices were at times very low. Over the next several years, sales of new farm machinery dipped dramatically, and the market for sale of farm equipment became hyper-competitive. As this Court especially appreciates, many farm implement dealerships failed, along with the farming operations upon which they relied, and all agri-business concerns were challenged to survive.

Partially as a result of the difficult economic times, the partnership and corporation became seriously delinquent on the Elliott notes. This predicament continued in spite of general improvement in the economy starting in about 1987. The parties executed a series of modifications to the contracts. Finally, in 1991, in order to stave off the Elliotts' threats of foreclosure, the parties, including Debtors (who had divorced in 1986), negotiated another modification of the terms of their original agreements. In that modification, the Elliotts agreed to reduce the balance of one of the notes, and the parties agreed to the amounts due and to a modified payment schedule.

Unfortunately, the modifications to the notes did not solve the problem, and in 1993 the Elliotts sued the dealership, the partnership, Debtors and the other principals to collect the notes and foreclose the various mortgages and liens securing the debts. Again the parties negotiated. As a result, it was agreed that the land and business would be sold to a third party for cash, the proceeds used to retire debt, including a significant payment to the Elliotts, and that the venture's principals would pay off the balance of the Elliott notes over time. Other principals in the enterprise made payments to the Elliotts. Debtors did not.

Status of the Proceedings.

Debtors filed for Chapter 12 relief on January 27, 1995, on the eve of trial in the state court foreclosure litigation. Debtors' bankruptcy schedules and the record in this case indicate that in addition to the obligation which the Court now decrees they owe the Elliotts, Debtors have in excess of $1,000,000 in other debt.[1] As near as the Court can determine from the record and the representations of Debtors' counsel in Court and in briefing, Debtors have been generally successful in resolving the objections made by other creditors to their proposed reorganization plans.[2] The Chapter 12 trustee has reserved his recommendation as to whether the plans should be confirmed pending the outcome of the dispute with the Elliotts.

While the Court repeatedly encouraged Debtors and the Elliotts to explore the benefits of a consensual plan, the Elliotts' objections remain unresolved. No settlement was reached. Debtors' plans, and their objection to the Elliotts' claim, contend that Debtors are excused from paying the Elliotts any further amounts. However, for the reasons set forth below, the Court has determined that

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[1] There have been approximately $1,300,000 in claims filed by creditors in each of the Chapter 12 cases other than the Elliott claim. As is usually the case, several debts are listed in Debtors' schedules for which no proofs of claim have been filed. Calculating the total amount owed by Debtors on the date of the bankruptcy filings is therefore an imprecise process.

[2] There does appear to be an outstanding unresolved objection to the Debtors' Joint Amended Plan filed by the Internal Revenue Service, whom Debtors acknowledge they owe about $122,000 in back taxes incurred by Debtors as a result of nonagricultural investment scheme. Given the Court's ruling on the Elliotts' objections, however, there is no need to address the Government's concerns.

Debtors' position is wrong. Consequently, when the Elliotts' claims are totaled along with Debtors' other obligations, Debtors owe significantly more than Congress has allowed to be restructured under Chapter 12. Moreover, given the impasse between these warring parties, the Court is not inclined to allow Debtors to convert to a Chapter 11 case, and dismissal of the bankruptcy cases is in order.

Discussion and Disposition of the Issues.

Congress, itself responding to the challenges presented by the anemic farm economy in the 1980s, added Chapter 12 to the Bankruptcy Code to allow family farmers a specially tailored means of reorganizing their financial affairs. However, eligibility for this relief, as opposed to that provided in Chapter 11 to all businesses, was restricted. Among other conditions, a debtor can access Chapter 12 only if its aggregate debt does not exceed $1.5 million, 80% of which must arise out of a farming operation owned and operated by the debtor. 11 U.S.C. § 101(18)(A). If Debtors owe the Elliotts what the creditors claim, that indebtedness, together with Debtors' other non-farm debt (principally the tax claim) make it impossible to satisfy the statutory limits for Chapter 12 eligibility.

Debtors dispute the accuracy of the amount of the Elliotts' claim. In addition, Debtors ask that the Elliotts' claim be disallowed completely, arguing that the claim is barred by applicable statutes of limitation. Debtors alternatively contend they are otherwise excused from paying the claim by the case law doctrines of impossibility of performance, and impracticality or frustration of purpose. The Court will address this last argument first.

Impossibility of Performance.

Debtors assert that the contracts they entered into with the Elliotts in 1982 were founded upon the assumption that general farm market and economic conditions would allow them to generate sufficient income through the implement dealership to pay the Elliotts the financed purchase price. They contend they were prevented from doing so through no fault of their own.

In support of their argument, Debtors present the expert testimony of Dr. Gilbert Miller, a farm economist and consultant. His account of the events of the 1980's is revealing. He suggests that changes in national economic policies, both monetary and fiscal, in the late 70's and early 80's caused a severe downturn in the farm economy, the likes of which had not been experienced in America since the Depression. His thoughtful presentation documents how interest rates for farm credit increased dramatically, while the value of the dollar declined internationally; how changes in monetary policies and tax laws led to a huge federal budget deficit; how the resulting weak farm export market combined with domestic problems caused a sharp drop in farm product market prices, and; how this combination of higher operating costs and less income had extremely adverse effects on our Nation's farmers and those businesses that depended upon farming. As a result, sales of new farm implements dropped markedly. Both nationally and locally, new equipment sales income declined to levels unprecedented in recent

times. This situation continued in the farm economy through 1987, when conditions began to improve.[3]

Debtors offer other testimony to support the notion that the implement dealership in which they invested suffered a particularly severe downturn. In particular, the tough times resulted in changes in local competition, from both independents and other dealers, which severely hampered sales.[4]

The Elliotts suggest that while adverse conditions in the economy had some effect, such was not the sole, nor even the primary reason for Debtors' company's inability to pay the Elliotts' notes. They feel Debtors assumed the risk of a change in economic conditions when they signed the notes, and that their agreement should be honored.

Under applicable Idaho case law, the doctrine of impossibility of performance may operate to excuse performance of

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[3] Dr. Miller offered his opinion that based upon his review of these macro-economic conditions, it would have been impossible for Debtors' farm implement dealership to operate profitably from about 1984-1987. The Court discounts the reliability of this opinion. Dr. Miller admitted he had no personal knowledge of any of the particular facts and circumstances of this dealership's operation; that he did not review its books, records or other evidence of how it operated; and that he did not do a "micro" analysis of the same economic factors for the Cassia/Minidoka county farm economy. Rather, the witness' testimony is helpful only as to general economic conditions existing at the time.

[4] Mr. Couch, who was an independent farm equipment dealer during the time in question, also testified for Debtors. However, it was apparent to the Court that Mr. Couch, because of the methods of operation he adopted, did quite well during the economic downturn.

a contract when the bargained-for performance is no longer capable of being performed due to the unforeseen, supervening act of a third party. *Haessley v. Safeco Title Ins. Co.*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). The *sine qua non* for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance. *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 348-49, 442 P.2d 753, 758-59 (1968). To prove up this defense (1) a contingency must occur; (2) performance must be impossible, not just more difficult or more expensive, and; (3) the nonoccurrence of the contingency must be a basis assumption of the agreement. *Haessly*, 121 Idaho at 465. *See also*, *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (1995).

Impracticality of performance or frustration of purpose, a doctrine similar in its essential elements, merely suspends the obligor's duty to perform while the contingency exists. *Sutheimer*, 127 Idaho at 85, 896 P.2d at 993, quoting from Section 269 of the Restatement (Second) of Contracts. The events constituting a contract impractical or frustrating its purpose must occur "without fault" as to the party offering the excuse. Restatement, §§ 281, 285, 286. A version of the doctrine of impracticality with limited applicability concerning the delivery of goods has been incorporated in the Idaho Uniform Commercial Code, Idaho Code § 28-2-615. In commenting upon the application of that statute, the Idaho courts give general guidance as to the context for application of these common law doctrines in a broader commercial context:

> Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen

> contingency which alters the essential nature of the performance. Neither is the rise or a collapse in the market itself a justification, for that is exactly the type of business risk which business contracts made [sic] a fixed prices are intended to cover. . . .

Lawrance v. Elmore Bean Warehouse, Inc., 108 Idaho 892, 894, 702 P.2d 930, 932 (Ct.App. 1985), quoting Comment 4 to Idaho Code § 28-2-615. The court goes on to note that virtually all contracts with fixed price terms could be subject to modification based on these doctrines upon significant changes in market factors, inviting countless suits by speculators as well as by persons merely disappointed in their bargains. *Id.*

The party asserting impossibility/impracticality of performance or frustration of purpose has the burden of proving the necessary facts for application of the doctrines. *Lawrence*, 108 Idaho at 894, 702 P.2d at 932. After considering these authorities, and even assuming the economic conditions were as presented by Debtors in their proof to the Court, for several reasons the Court concludes Debtors are not excused from performance of their contracts with the Elliotts by impossibility, impracticality or frustration of purpose.

First, of all, the Court notes that Debtors' own expert establishes that adverse economic changes were well underway by the time the contracts between Debtors and the Elliotts were negotiated. Dr. Miller explains that the prime interest rate had already reached 20 percent by mid-1981; significant changes in monetary policy had commenced, evidenced by a decline in gross domestic product, and; the Economic Tax Recovery Act was passed in 1981, cutting taxes, resulting in an immediate increase

in the federal deficit. Banks and other lenders, including local institutions, had already begun tightening their credit policies and stiffening their loan requirements by 1982. All of these factors and many others show that the changes in economic conditions upon which Debtors rely to justify excusing their performance to the Elliotts were indeed in process at the time the parties entered their agreement.

Moreover, the farm economy in particular, as this Court has repeatedly observed over the years, is by nature predictably unpredictable. That is, due to the extent of the influence of external factors on agribusiness, a crisis, possibly of substantial duration, is perhaps only the next growing season away. In other words, even if the parties did expect the income from the implement business to be sufficient to make the contract payments, the Court can not conclude it was unforeseeable that the economy would markedly deteriorate before the long-term contract balance was to be paid. Perhaps the best evidence of the skepticism of the parties is the fact that the Elliotts insisted on guarantees and additional collateral to secure payment, to which Debtors agreed.

The Court also can not conclude that the dealership's inability to make the payments due to the Elliotts was occasioned solely as a result of the poor business climate. Through their evidence, the Elliotts showed the Court that the implement dealership was likely under-capitalized and took on more debt that it could expect to service; that is suffered from problems with management, losing key employees at critical times; relations with John Deere were at times strained; and, that the company's principals were frequently at odds over important issues. Each of

these factors likely contributed in some degree to the failure to make the Elliott payments.

Debtors' excuse is also conspicuous in its failure to acknowledge that they renegotiated the Elliott contract, either individually or through their agents, after economic conditions began to improve. If Debtors were excused from paying the Elliotts, the Court concludes that such defense was contracted away when they agreed with the Elliotts to the 1991 modification in consideration of the Elliotts' agreement to defer foreclosure.

Conditions were indeed difficult for those in farming in the 1980's; Chapter 12 is the progeny of those adverse conditions. Debtors' farm machinery business was hard-hit by the soft economy. However, such a business is by its nature fraught with risk, and if Debtors were to prevail in this defense, few debts incurred in the industry during these years would be collectible. The Court is not inclined to grant the moratorium Debtors presume to sponsor, and the Court concludes that the Elliotts' notes are valid.

Statute of Limitations.

Through a convoluted argument, Debtors argue that the Elliotts' claim against them under the promissory note are time barred under applicable statutes of limitation, ostensibly based upon the law as explained in this Court's decision in *In re Ogle*, 95 I.B.C.R. 275.[5] Debtors' argument lacks merit.

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[5] To be clear, the Court observes that its decision in *Ogle* is currently the subject of a timely appeal to the U.S. District Court, and

(Continued on following page)

In *Ogle*, in 1981 the debtors executed a promissory note calling for annual payments, secured by a mortgage, in favor of a creditor. The debtors made one payment in 1982, and the note was modified in 1983. The debtors made no further payments on the note, the creditor took no action to foreclose the mortgage or collect the note, and in 1995 debtors filed for bankruptcy. When the debtors objected to the creditor's claim, the Court held that the mortgage and the underlying note obligation were unenforceable. 95 I.B.C.R. at 276-279.

Here, once again, Debtors' argument conveniently disregards the implications of the formal modifications to their contracts with the Elliotts occurring in 1991. At that time, accommodations for any existing defaults were made by the parties, and Debtors acknowledged the continuing vitality of their debt to the Elliotts in the modification agreement. Whatever the status of the notes at that date, any limitations defense to the debts were bargained away by Debtors as a part of the modification.

Amount of Elliotts' Claim.

Debtors assert that the Elliotts' accounting of transactions on the notes fail to give proper credit for payments made, and are otherwise inaccurate. They contend that the Elliotts "manipulated" the application of payments so as to preserve their rights under the contracts to continue a mortgage against Debtors' property. Both parties submitted proof on this issue. The Court notes that the

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therefore is not final. Consequently, the decision does not serve as precedent in this District.

evidence is conflicting, and there is room for disagreement over the precise application of all payments made from the various obligers on the notes, especially considering the length of time and the number of payments involved. Though disputed, the Court accepts as true the accounting of the indebtedness offered by the Elliotts at the hearing through the testimony of the officers and business records of the escrow company, as the correct amount of the balances due on the debt for purposes of the bankruptcy proceedings only. The Court does not see any evidence of intentional manipulation of payments to the prejudice of Debtors, all payments having been applied according to the agreements of the parties. Accordingly, while Debtors may raise their contentions anew in any state court litigation, for present purposes, the Court is satisfied that the balance due to the Elliotts on both notes, after appropriate credits, is $687,388.26.[6]

When the amount owed the Elliotts is included with Debtors' other indebtedness, the Court must conclude that Debtors, on the date they filed for Chapter 12 relief, owed more than $1.5 million in aggregate debt. Additionally, neither the Elliott debt nor the tax obligation to the I.R.S. arose from a farming operation. Debtors also are ineligible for relief because less than 80/% of their debt arose from a farming operation.[7]

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[6] See Elliotts' Post-trial Memorandum, p. 5.

[7] Debtors argue that even if the debt to the Elliotts is not excused, it should not be counted in the "80% analysis" because it is "contingent." Debtors' obligation to the Elliotts is not contingent as that term is used in Section 101(18)(A), however, because their liability to the

(Continued on following page)

Conversion or Dismi[illegible]al.

Technically, though they are ineligible for Chapter 12 relief, Debtors could ask to convert to Chapter 11, again offer their plans, and again present many of the same issues raised concerning confirmation. However, for several reasons the Court concludes that conversion would be a useless gesture, not likely to result in confirmed plans.

In Chapter 11, creditors, by class, are entitled to vote for or against a plan. 11 U.S.C. § 1126(a). The Elliotts, who would hold the bulk of the unsecured debt, would likely oppose Debtors' reorganization effort, and thereby control the outcome of voting by the unsecured creditor class. 11 U.S.C. § 1126(c). Debtors' plans could only be "crammed down" over the Elliotts' negative vote by compliance with the Bankruptcy Code's "absolute priority rule." 11 U.S.C. § 1129(b)(2)(B). Because Debtors proposed to retain, rather than liquidate, their assets, they would have to propose to pay unsecured creditors in full. Given the amount of debt and Debtors' circumstances, the prospects of doing so seem remote.

Moreover, the Elliotts have raised a variety of arguments in the Chapter 12 cases suggesting that Debtors lack good faith in pursuing reorganization. The Court makes no final conclusions as to this argument here because Debtors are not eligible for relief. However, there is considerable evidence in the record showing that Debtors systematically transferred away many of their most

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Elliotts is subject to ready determination. *See, e.g., In re Nicholes*, 184 B.R. 82 (9th Cir. B.A.P. 1995).

valuable properties shortly after falling into default on the Elliotts' notes. Debtors also own and control valuable farm land in Washington in their daughters' name without, in the Court's opinion, adequate justification for such. Debtor Darwin Neibaur has over $106,000 in a cash IRA account which he claims as exempt, even though at his advanced age and in his strained financial condition he has not sought to access. The Court doubts the *bona fides* of the exemption claim. Finally, Debtors have been less than generous in the valuations assigned to their interest in Darwin Neibaur Farms, the family partnership. Valuation evidence was offered by both sides concerning this entity. Unless the partnership is willing to liquidate and pay out its equity to the partners, the Court would be extremely reluctant to accept Debtors' values absent full payment to their creditors.

Debtors appear to have made peace with most of their major creditors. However, their desire to continue the battle with the Elliotts leads the Court to conclude further reorganization efforts will be fruitless.[8] Without making final determinations on any of the above factors discussed above, the Court is sufficiently convinced that Debtors would be unsuccessful in proceedings under Chapter 11,

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[8] Debtors remind the Court that while the original notes to the Elliotts totaled just over $2 million, that the Elliotts have received over $3 million in payments already, much of which has been applied to accrued interest and costs. Debtors are more impressed with this fact than the Court. Since even the wage-earner will eventually pay about three times the deferred balance over the thirty-year term of a simple home mortgage, Debtors should not be shocked with the total amount payed to the Elliotts. The remedy for this alleged injustice would simply require early payment of the balance due on the notes.

and concludes that good cause exists to dismiss these bankruptcy cases. 11 U.S.C. §§ 1208(c)(1), (5), (9).

Conclusion

Neither Darwin nor June Neibaur are eligible for Chapter 12 relief. Under the circumstances, the bankruptcy cases should be dismissed.[9] For these reasons, the Court will be [sic] separate order overrule Debtors' objection to the Elliotts' proof of claim, deny confirmation of Debtors' proposed Joint Amended Chapter 12 Plan and grant the Elliotts' motion to dismiss This Memorandum constitutes the Court's findings of fact and conclusions of law. F.R.B.P. 7052.

DATED this 7th day of August, 1996.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY
JUDGE

[9] The Court would reconsider dismissal if Debtors indicate a desire to convert to Chapter 7 within ten (10) days of the day hereof.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re JUNE G. NEIBAUR, Debtor.	BAP No. ID-96-1842-RoJRy BAP No. ID-96-1843-RoJRy (consolidated) BK No. 95-00209 Adv. No. 95-6073
In re DARWIN P. NEIBAUR, Debtor.	BK No. 95-00205 Adv. No. 95-6074
DARWIN P. NEIBAUR and JUNE G. NEIBAUR, Appellants, vs. EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife, Appellees.	**MEMORANDUM**[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. *See* BAP Rule 13 and Circuit Rule 36-3.

Argued and Submitted on June 25, 1997
at Boise, Idaho

Filed – JUL 24 1997

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas,
Chief Bankruptcy Judge, Presiding

Before: ROBLES[2], JONES and RYAN, Bankruptcy Judges.

This is a consolidated appeal from two related bankruptcy cases. The appeal arises from the bankruptcy court's order (1) overruling the debtors' objection to claim, (2) dismissing the debtors' joint amended Chapter 12 plan and (3) granting the motion to dismiss the Chapter 12 cases. The debtors timely filed their notices of appeal. Although the debtors violated Federal Rules of Bankruptcy Procedure 8006[3] by failing to file their respective designation of issues and records on appeal within ten days of the notices of appeal, the record is now complete for review by this Panel, and the severe sanction of dismissing the appeal is not warranted. *In re Fitzsimmons*, 920 F.2d 1468 (9th Cir. 1990) (holding that unless there are egregious circumstances, the court as a general rule should consider alternative sanctions before dismissing the appeal).

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[2] Honorable Ernest M. Robles, Bankruptcy Judge for the Central District of California, sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

FACTS

June G. Neibaur and Darwin P. Neibaur (collectively "Appellants") filed separate Chapter 12 petitions on January 27, 1995. Although currently divorced, all relevant facts occurred during the time of their marriage.

On October 15, 1982, the Appellants and others, John and Patricia Hansen (collectively "Hansens") and Edward and Zina Heiner (collectively "Heiners"), formed an Idaho corporation known as Green Line Sales, Inc. to purchase an existing John Deere farm implement dealership from Edward and Mary Elliott (collectively "Appellees"). Green Lines Sales, Inc. ("Green Line") executed a promissory note in the amount of $1,025,000 in favor of the Appellees, guaranteed by the individual shareholders, including the Appellants, and the assets of Green Line. The promissory note was further secured by mortgages in favor of the Appellees on properties owned by the Hansens and the Appellants. The mortgages specifically state that "*in the event of a foreclosure sale*" the Appellees will sell the Hansen property before the Appellants' property.

At the same time as the Green Line promissory note, the Appellants, Hansens and Heiners formed a limited partnership to purchase the real property upon which the dealership is located. The partnership gave the Appellees a promissory note for $1,100,000, secured by a mortgage on the property being purchased. The parties generally understood that the income generated by the dealership would provide the source for making the monthly installment payments to the Appellees.

Green Line and the partnership became delinquent in paying on the promissory notes due to the severe downturn in sales as a result of the general depression in the

farm economy during the 1980s. On September 30, 1991, the parties, including the Appellants, entered into a modification agreement. Appellants and the other borrowers reaffirmed their obligations under the promissory notes, including the delinquent interest rates, in consideration of a $700,000.00 reduction in the principal under the Green Line promissory note and other modifications. Green Line and the partnership once again defaulted on the September 30, 1991 modification agreement.

The Appellees filed suit in state court on August 10, 1993 to foreclose on the securities given under the two promissory notes and to enforce the personal guarantees of the partners and the shareholders. By a stipulated agreement approved by the state court on March 11, 1994, a third party purchased the dealership and the land for cash, with the proceeds being used to retire some of the debt. Subsequently, the Appellees and the Hansens entered into a settlement agreement, approved by the state court judge, under which the Appellees agreed to settle their claims against the Hansens for $750,000. As part of that settlement agreement, the Hansens pledged to the Appellees $150,000 in lieu of foreclosing on the mortgage given as additional security for the Green Line promissory note. Thereafter, the state court dismissed the Appellees' claim against the Hansens with prejudice.

While the Hansens settled with the Appellees, the Appellants filed for bankruptcy and brought separate objections to the Appellees' proofs of claim. The Appellants filed a joint amended Chapter 12 plan, and the Appellees countered with motions to dismiss both Appellants' Chapter 12 bankruptcy cases. On August 8, 1996, following an evidentiary hearing that lasted for seven days, the trial

court issued a Memorandum of Decision and an accompanying Order (1) overruling the Appellants' objections to the Appellees' proofs of claim, (2) denying confirmation of the Appellants' Joint Amended Chapter 12 Plan, and (3) granting the Appellees' Motion to Dismiss the bankruptcy cases. The Appellants appeal from the order of the trial court.

The trial court found that when the Appellees' claims are totaled with the Appellants' other debts, they owe significantly more than Congress has allowed to be restructured under Chapter 12.[4] The trial court also concluded that conversion of Appellants' bankruptcy cases to Chapter 11 would be futile because the Appellees would vote against a plan under that chapter as well.

The issues on appeal only deal with the trial court's order overruling the Appellants' objection to claim and the classification of the tax obligation owed to the Internal Revenue Service ("IRS") for the year 1976. However, as explained above, the orders denying confirmation and dismissing the cases are based on the trial court's decision overruling the objections to claim. For the reasons set forth below, we **AFFIRM**.

ISSUES ON APPEAL

1. Whether the Appellees' claim is barred by Idaho's "one action rule."

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[4] To qualify as a "family farmer" eligible to file under Chapter 12, the aggregate debts of the debtor may not exceed $1,500,000 and not less than 80% of non-contingent, liquidated debts must arise out of a farm operation. 11 U.S.C. § 101(18).

2. Whether the Appellees' claim is barred as a result of impossibility, impracticability and/or frustration of purpose.

3. Whether the tax obligation owed to the IRS for the tax year 1976 is a non-farm operation.

STANDARDS OF REVIEW

The Bankruptcy Appellate Panel reviews a bankruptcy court's findings of fact under the clearly erroneous standard. *In re Tully*, 202 B.R. 481, 483 (9th Cir. BAP 1996). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *In re Pena*, 207 B.R. 919, 920 (9th Cir. BAP 1997) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

The bankruptcy court's conclusions of law are reviewed *de novo*. *Tully*, 202 B.R. at 483 (citing *In re United States Trustee*, 32 F.3d 1370, 1372 (9th Cir. 1994)). Whether an activity constitutes a farm operation is an issue at law, which the Panel reviews *de novo*. *In re Watford*, 898 F.2d 1525, 1527 (11th Cir. 1990).[5]

Whether the doctrines of impossibility, impracticability and/or frustration of purpose are applicable in a given case is a mixed issue of law and fact, which the Panel reviews *de novo*. *Waegemann v. Montgomery Ward & Co., Inc.*, 713 F.2d 452, 453 (9th Cir. 1983); *City of Boise v. Bench Sewer Dist.*, 116 Idaho 25, 29 (1989) (defining Idaho

[5] There are currently no published Ninth Circuit or BAP opinions on what constitutes a farm operation.

contract law, which is applicable here). A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. *In re Canino*, 185 B.R. 584, 589-90 (9th Cir. BAP 1995).

DISCUSSION

1. Whether the Appellees' Claim is Barred by Idaho's One Action Rule.

Upon review of excerpts on appeal and following oral arguments, we conclude that the "one action issue" has not been properly raised on appeal. The Bankruptcy Appellate Panel may only review matters that were properly raised and decided by the bankruptcy court. *In re Greenfield Drive Storage Park*, 207 B.R. 913, 918 (9th Cir. BAP 1997). Issues that are raised for the first time on appeal will not be considered. *In re NSB Film Corp.*, 167 B.R. 176, 180 (9th Cir. BAP 1994).

Here, the Appellants first raised the "one action rule" issue at the post-trial closing argument.[6] The Appellants contend that they raised the *factual basis* for the "one action rule" argument in the [sic] their objections to claim and the Amended Schedule "F". The only conclusions that can be reached from reviewing these documents are that the Appellants object to the Appellees' claim and that such

[6] The Excerpt of Record on Appeal does not contain a transcript or certified copy of the closing argument. The Appellants have attached a copy of the closing argument to their brief. The copy of the closing argument is not filed stamped as having been received by the bankruptcy court.

claim should have a value of $0. The Appellants did not raise this issue to the trial court, and that court did not rule on the issue. Based on the trial court's Memorandum of Decision, it appears that the parties argued and the court below decided whether the Appellees' claim is barred by the statute of limitation, a related but completely different issue. Merely claiming that certain documents raise the factual basis for an argument without actually making such an argument before the trial court is insufficient.

During oral argument, counsel for the Appellants stated that the "one action rule" argument was raised during an in-chambers meeting with the trial judge. Appellees' counsel disputed this assertion and stated that the trial court merely took note of the fact that title to the property had been transferred to a new entity related to the Appellants shortly before the action had been commenced. This new entity had not been pled into the action. Therefore, while the trial court did not believe it could determine the issues affecting title, including the application of the "one action rule", it determined that it could rule on the objection to claim issue. The "one action rule" argument, thus, is viable if raised before the state court. *Piombo Corp. v. Casterlock Properties*, 781 F.2d 159, 163 (9th Cir. 1986).

As this matter has not been properly raised on appeal, we do not look to the merits of the issue.

2. Whether the Appellees' Claim is Barred by the Doctrines of Impossibility, Impracticability and/or Frustration of Purpose.

The bankruptcy court rejected the Appellants' argument that the equitable doctrines of impossibility, impracticability and frustration of purpose excused their performances due under the promissory notes as a result of the severe downturn in the farm economy beginning about 1984. We review mixed questions of law and fact *de novo*. The Appellants, as the party asserting the equitable defenses of impossibility, impracticability and frustration of purpose, bear the burden of proving the necessary facts to support the doctrines. *Lawrence v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892, 894 (Idaho Ct. App. 1985).

A. Impossibility and Impracticability.

The required elements for the doctrine of impossibility in Idaho are:

> (1) contingency must occur; (2) performance must be impossible, not just more difficult or more expensive; and (3) the non-occurrence of the contingency must be a basic assumption of the agreement.

Haessly v. Safeco Title Ins. Co. of Idaho, 212 Idaho 463, 465 (1992). "A sine qua non for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance." *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 349 (1968). A mere change in the degree of difficulty or expense due to such causes as increased wages, prices or costs do not amount to impracticability.

RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981). The continuation of existing market conditions and of financial situation of one of the parties are ordinarily not basic assumptions, so that mere market shifts or financial inability do not usually amount to impracticability. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (1981).

For the Appellants to prevail, they must prove that the non-occurrence of the contingency, in this case the severe down turn in the farm economy, was a basic assumption underlying the contract. First, the Appellants must prove that performance became impossible, not merely more difficult. Second, it is insufficient to merely claim that there was a severe down turn in the farm economy. The Appellants must prove that both they and the Appellees entered into the promissory notes relying on the continued prosperity in the farm economy.

The Appellants have failed to prove the elements required for impossibility. Most of the evidence considered by the trial court, including the testimony of Dr. Gilbert Miller, the Appellants' main expert witness, goes to prove that a depression in the farm economy existed during the 1980s. There is no evidence that the parties expressly contracted or contemplated the continuation of a strong farm economy as a contingency for payment. The trial court discounted the reliability of Dr. Miller's testimony because he did not have personal knowledge of any of the particular facts and circumstances of this case. Dr. Miller testified that he had never reviewed the books, records or other evidence of the Appellants' John Deere dealership's operations. The trial court's factual analysis was not clearly erroneous.

The case of *Twin Harbors* provides an interesting analogy. In *Twin Harbors*, the parties expressly agreed in a written contract that the promissory note was to be paid out of the proceeds derived from the sale of timber on the property being sold. Subsequently, the exclusive buyer of the timber, who also happened to be the mortgagee on the property, went out of business. The mortgagor raised the defenses of impossibility and frustration of purpose to excuse its performance under the contract. The Supreme Court of Idaho, however, found that the provision in the contract cited above was merely an alternative method of payment. *Twin Harbors*, 92 Idaho at 349. The court concluded that the parties intended to pay off the mortgage in money or money's worth. *Id.*

Here, the Appellants and the Appellees never expressly agreed in a written contract that the income generated by the John Deere dealership would be sufficient to pay off the promissory notes. We look to the reasoning behind the *Twin Harbors* decision and find that the Appellees intended to be paid in money or money's worth. The income generated by the dealership was merely an alternative source of payment. Once the farm economy went sour around 1984, the Appellants' performance became more difficult but not impossible. In fact, other farm implement dealers, including those who Appellants called as their witnesses, did quite well during the 1980s.

Secondly, the Appellants have failed to prove that the continued vitality of the farm economy was a basic assumption between the parties at the time of the agreement. As the lower court found, farm economy is by its very nature unpredictable. It is highly unlikely that the Appellees would enter into two long-term promissory notes

for over $2 million with the assumption that they would be paid only when the Appellants felt the economy merited paying on the notes. There was never a written agreement or warranty in the numerous promissory notes, personal guarantees and subsequent modifications making the performances due by the Appellants contingent upon the level of business of the John Deere dealership. In the absence of such written contractual agreement, we find that the basic assumption underlying the promissory notes did not include the continued vitality of the farm economy.

We note by analogy a Sixth Circuit case in which a farm equipment dealer cited the dramatic market shift in the farm economy during the 1980s as an excuse to unilaterally terminate its dealership agreement, citing impossibility, impracticability and frustration of purpose. *Karl Wendt Farm Equip Co., Inc. v. International Harvester Co.*, 931 F.2d 1112 (6th Cir. 1991). The Sixth Circuit found, relying on Restatement (Second) of Contracts, that neither market shifts nor the financial inability of the financially strapped dealer changes the basic assumption of the contract such that it may be excused under the doctrines of impossibility, impracticability and frustration of purpose. *Id.* at 1117-18. As the lower court stated, to hold otherwise would excuse all contract performances entered into during the 1980s in Idaho.

The doctrine of impossibility also requires that the contingency which excuses the performance must be "unforeseen" and caused by a third party. *Haessly*, 121 Idaho at 465; *see also Connecticut Nat'l Bank v. Trans World Airlines*, 762 F. Supp. 76 (S.D.N.Y. 1991) (stating that events such as increases in oil price and the ever imminent threat of war in the Middle East are insufficient to raise the defense of impossibility because they are

foreseeable). As stated above, fluctuation in the farm economy is not only foreseeable but is to be expected. The trial court also found sufficient evidence of mismanagement and undercapitalization which may have led to the decline in the performance of the John Deere dealership. For example, the dealership operated for many years during the 1980s without a manager with the experience level required by John Deere. The trial court's findings of fact in this regard are not clearly erroneous.

We distinguish this case from cases dealing with true impossibility defenses to contracts. A good example of a valid impossibility defense is reported in *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293 (E.D. Mo. 1984), *aff'g* 758 F.2d 341 (8th Cir. 1985), *cert. dismissed*, 474 U.S. 948 (1985). In that case, McDonnell Douglas Corporation ("McDonnell Douglas") entered into a contract with the Imperial Iranian Air Force for the sale of spare parts for F-4 fighter aircraft in 1975. Following the fall of the Shah of Iran in 1980, McDonnell Douglas was unable to perform its duties under the contract because shippers refused to transport goods to Iran, the United States Government prohibited selling any military equipment to Iran, and the Imperial Iranian Air Force no longer existed.

When the Islamic Republic of Iran sued for breach of contract, the court concluded that it was physically and legally impossible for McDonnell Douglas to perform. Basic assumptions underlying any contract, like the continuing existence of the other party to the contract and the availability of shippers, no longer existed, excusing McDonnell Douglas' performance. *Id.* at 298-99.

The fact pattern in this case does not rise to the level of impossibility as described in *McDonnell Douglas*. To allow the impossibility defense to go forward in this case would mean any party to a contract could get out if the economy weakens. As did the trial court, we find the Appellants' argument unpersuasive.

B. Frustration of Purpose.

The doctrine of frustration of purpose is much narrower than impossibility and requires the following:

> The frustration principle operates in a proper situation to excuse a promisor's duty of performance if some supervening event has destroyed the value of the counter-performance bargained for by the promisor, even though the counter-performance is still literally possible.

Twin Harbors, 92 Idaho at 348 (although this case specifically deals with a supervening event, the doctrine of frustration of purpose may apply to events that arose before the contract). The classic example of the frustration doctrine is *Krell v. Henry*, 2 K.B. 740 (1903), where a promisor's duty to pay 75 pounds rent for a balcony to view the King's coronation was excused due to the cancellation of the procession. Although the counter-performance, the renting of the balcony, was literally possible, the cancellation of the procession destroyed the value or the purpose behind the transaction.

The situation between the Appellants and the Appellees does not fall under the doctrine of frustration of purpose. The value of the counter-performance bargained for by the Appellants has not been destroyed. In fact, the Appellees completed their performance due under the

promissory notes when they transferred their interests in the dealership and the real property to the Appellants and other buyers. Having received and enjoyed the counter-performance they bargained for, the Appellants cannot now seek to excuse their performance under the doctrine of frustration of purpose.

We find that the doctrines of impossibility, impracticability and frustration of purpose do not bar the Appellees' claims against the Appellants. The trial court's order overruling the Appellees' objections to claim is affirmed.

3. Whether the Tax Obligation Owed to the IRS is a Non-Farm Obligation.

On appeal, the Appellants assert that the trial court erred by concluding that the tax obligation owed to the IRS for the tax year 1976 did not arise from a farm operation. This is an issue of law, which the Panel reviews *de novo*. In a Chapter 12 case the debtors, the Appellants in this case, have the burden of establishing that their plan complies with the statutory requirements of confirmation. *In re Buckingham*, 197 B.R. 97, 102-03 (Bankr. D. Mont. 1996).

We note that, as a result of our determination of the objection to claim, this issue will not affect our decision to affirm. We address the tax issue only to the extent that it acted as an alternative basis to dismiss the Appellants' Chapter 12 cases because they failed to meet the 80 percent threshold for debts arising out of farm operations. 11 U.S.C. § 101(18)(B)(ii).

The Appellants' position is that the only evidence regarding the nature of the IRS debt was the testimony of

Darwin Neibaur. As a result, the Appellants believe the trial court was bound to accept the testimony. We disagree. A trial court is free to reject testimony it finds untrustworthy. *Plummer v. Western Intern. Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981). As set forth below, Darwin Neibaur's testimony regarding the nature of the IRS debt is so brief, unsupported and conclusory that we will not disturb the lower court's determination that the testimony did not sustain the Appellant's burden of proof at trial.

11 U.S.C. § 101(21) defines a farm operation as:

> farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock, and production of poultry or livestock in an unmanufactured state.

11 U.S.C. § 101(21) (1994). Although the list is non-exclusive, courts have narrowly construed the definition of what constitutes a farm operation. For example, a contract farming venture did not constitute a farming operation. *In re California Land and Equip. Leasing Co.*, 72 B.R. 1 (Bankr. E.D. Cal. 1984). Not even services related to farming, like aerial crop dusting or harvesting services, constitute a farm operation. *In re Van Air Flying Serv.*, 146 B.R. 816 (Bankr. E.D. Ark. 1992); *In re Blackwelder Harvesting Co.*, 106 B.R. 301 (Bankr. M.D. Fla. 1989).

The record on appeal as to exactly how the IRS's claim arose is sparse. Appellant Darwin Neibaur's testimony states that he tried to delay realizing income from his farm for the tax year 1976 by "straddling" on silver or gold. Although this is not much to go on, straddling in commodities definitely falls outside of the definition of 11

U.S.C. § 101(21) and related case law. Because the burden of proof was on the Appellants at the trial court, they cannot now shift the burden to the Appellees on appeal. The trial court's decision as to this issue is affirmed.

CONCLUSION

Based on the foregoing, we affirm all issues on appeal. As a corollary to affirming the issues on appeal, the trial court's orders (1) overruling the Appellants' objections to the Appellees' claim; (2) denying confirmation to the Appellants' Joint Amended Chapter 12 Plan; and (3) dismissing the Appellants' bankruptcy cases are **AFFIRMED.**

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit Court of Appeals
125 South Grand Avenue
Pasadena, California 91105
(626) 583-7906

NOTICE OF ENTRY OF JUDGMENT

BAP No. ID-96-1843-RoJRy

RE: DARWIN P. NEIBAUR

A separate Judgment was entered in this case on ___ 7/24/97 ___.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made

payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.